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Technical Paper/Expert Opinion on UKRAINIAN REGULATION »ON THE CIVIC COUNCIL UNDER THE GOVERNMENT AGENT FOR THE ANTICORRUPTION POLICY AFFAIRS«

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I INTRODUCTION

It has become obvious in the last years that the state with its institutions can not fight corruption alone. If there is not an active support by the private sector, citizens and their forms of cooperation (the most common is the form of the NGOs) only certain aspects of corruption can be tackled. Therefore, continuously more elements of the civil society are being included in the anti-corruption efforts. Different countries do that in different ways and the responses from the civil society differ among countries as well. Nevertheless some general rules on how to ensure the best possible cooperation between the NGOs and the state in all areas, not only in the area of fighting corruption, were developed. Those rules are more or less respected by all actors involved, despite the fact that they are usually not written down. However, since they have emerged on the basis of the most typical characteristics of the state institutions on one hand and the civil society organisations on the other, they are followed by a growing number of countries with the aim to establish a fruitful cooperation. These rules can be easily described as the following:

- The state can not force the private sector to take part in its endeavours, it can only invite it,
- When invited, it is completely up to the private sector to decide if, how and to what extent it will respond to the invitation,
- Forms of cooperation between the state- and the civil society institutions have to be regulated by legal provisions at least in the most general extent,
- The state can not interfere with the civil society decisions on how the latter will organise itself for the purpose of cooperation,
- The state has to ensure that all NGOs have the same possibility to engage in the cooperation,
- Substantial decisions of the civil society are not binding for the state, but if rejected, the civil society has the right to an explanation,
- The “civil society” entails organisations from the economic//business sphere and all other organisations, which are not owned or run by the state.

It is promising to see that Ukraine and its “Government Agent for the Anticorruption Policy Affairs” have decided to invite the civil society to join the Agent’s efforts in the area of anti-corruption policy. Although cooperation with the civil society is not exactly a common feature of the ex-communist countries, it is refreshing to observe how Ukraine is seeking cooperation with the private sector. This is especially important in the anti-corruption area: corruption is the enemy of all elements of the society and thus has to be tackled by all elements of the society!

The structure of this review is very simple: there are some general comments presented to certain paragraphs of the evaluated document, which are occasionally accompanied by concrete remarks to the parts of the text that raised some issues or concerns. Where there are no comments to a specific part of the text, this simply means that the author of this review agrees with it and that there were no comments needed.

II REGULATION “ON THE CIVIC COUNCIL UNDER THE GOVERNMENT AGENT FOR THE ANTICORRUPTION POLICY AFFAIRS” (HEREINAFTER: REGULATION)

Para 1

The following does not present a substantial issue, but it is much nicer to read that an organisation like the Civic Council (hereinafter: the CC) is not created “under” the government agent but as a “form of cooperation//in cooperation with the government agent”.

Para 4

The so-called “tentative plan” is mentioned several times (bullet-points 1, 3,..), yet the content of this plan is not described anywhere in the Regulation; furthermore it is not only its content that is important: its adoption and ways of implementation have to be regulated, too. If there are no such provisions in other legal texts, it would be necessary to include them in the Regulation. Otherwise, this Paragraph transfers a very large array of tasks to the civil society, which is a very positive feature.

Para 5

In the first “bullet-point” it is said that information can be obtained “as regulated” – hopefully, the civil society’s access to information possessed by the state is really regulated in compliance with international legal instruments (on the access to public information) somewhere//in some other legal documents. Still, based on the obviously profound cooperation between the Agent and the CC it would be desirable to include some specific provisions on that topic also here.

In the third bullet-point, the consent of heads of different organisations is mentioned. Since the representatives of the different organisations taking part in activities of the CC will have to be appointed by their organisations (technically: their superiors), this is an unnecessary part of the text.

Para 6

This is the most problematic Paragraph, since it applies to the civil society’s sovereign right on the self-organisation.

The second sub-paragraph stipulates the approval of the Government Agent (on the personal//personnel? and the quantitative composition of the CC). According to the third sub-paragraph the acceptance of the new members (and suspension of the old ones) is made by the Government Agent upon the presentation of information defined in the fourth sub-paragraph. The exception concerning the number of representatives from non-governmental bodies is mentioned in the fifth sub-paragraph; in the absence of the detailed provision it is obvious that the Government agent is deciding on the exception, too.

The solutions described above are seriously interfering with the rights of the civil society organisations, since they enable the state to influence the structure and the level of the organizations' cooperation with the Government Agent. In such a situation also the Government Agent is exposed to an extended responsibility, which will be scrutinised (and rightfully criticised!!) all the time.

It would be a much better solution to regulate only the most basic features of the civil society's involvement. One of the possible solutions would be the following text of sub-paragraphs 2, 3, 4 and 5:

Sub-paragraph 2:

“The Government Agent publicly invites the civil society organisations mentioned in the previous sub-paragraph to nominate their representatives for the Civic Council in 30 days from his invitation, when he convenes the first meeting of all nominated representatives. The final composition of the Civic Council can not exceed 30 persons.”

Sub-paragraph 3:

“Meeting of the representatives from the previous sub-paragraph is chaired by the oldest representative and decisions are made by the simple majority in vote casting. The Government Agent has the right to be present at the meeting and to chair it until the selection of the oldest representative is performed, but he does not have the right to vote”.

Sub-paragraph 4:

“During the meeting representatives of different civil society organisations are obliged to present themselves to the group”.

Sub-paragraph 5:

“During the meeting mentioned in the previous sub-paragraphs at least the following decisions have to be made:

- on the structure of the Civic Council,

- on the number of representatives from the same civil society organisations ,
- on the single chairperson and three deputies.”

The idea of the proposal is very simple: it is completely up to the NGOs to organise themselves since the state has no right to interfere with one of the basic features of the civil society.

Para 7

Following the idea and proposals from the previous Paragraph, the second and the third sentence in Para 7 can be deleted: it is absolutely very strange to see a representative of a government (the Government Agent) presenting a proposal for the nomination of the Head of the civil society structure!

Para 9

In the first sentence “coordination with the Government Agent” is mentioned. Hopefully, that means only a very general coordination not enabling the Agent to substantially interfere with the work of the CC. It is basically very simple: the CC is absolutely independent in its work but the results of its activities may or may not be accepted by the Government Agent (as mentioned in the last sentence of Paragraph 10).

Para 11

Again, there is no need to include the obligation for the CC chairperson to engage the Government Agent (as stipulated in the last sentence) into the preparation of the CC meetings. Therefore, the last sentence has to be deleted since it is an absolute right of the civil society to discuss different issues at will.

Para 12

It would perhaps be a good idea to add a part on the expenses of the CC’s work. It is important to know who has to pay for the work of the Secretariat.

III CONCLUSION

Inclusion of the CC into the work of the Government Agent is an excellent idea and also the possibilities/responsibilities given to the Council. What remains as a concern is an extensive prerogative given to the state to extend influence on the civil society. It does not make too much sense to widely open the possibilities for the NGOs’ participation and then to control them through some extremely questionable provisions already mentioned in the second chapter of this review (paragraphs

6, 7 and 11). Decision of the Government Agent to establish a CC is an important step forward for the Ukrainian authorities in their efforts to include all parts of the society in the fight against corruption, but the solutions are not yet at the desirable level. Domestic and international public will appreciate the independence of the CC much more and if provided by such independence, this solution will for sure serve as an example for many other countries still stumbling over the idea on the involvement of the civil society in their anti-corruption efforts.